

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY
OFFICE OF PIPELINE SAFETY

In the Matter of the Administrative Penalty
Order Issued to M.S. Coffman
Construction Co.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:30 a.m. on April 16, 1999 at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing was held pursuant to a Notice and Order for Hearing dated February 1, 1999. The record closed at the conclusion of the hearing on April 19.

Jeffrey S. Bilcik, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, MN 55103-2106, appeared on behalf of the Minnesota Department of Public Safety, Office of Pipeline Safety. Mark S. Coffman d/b/a M.S. Coffman Construction Co., 15901 Sunfish Trail S.E., Prior Lake, MN 55374, was present at the hearing. He appeared on his own behalf and without counsel.

NOTICE

This Report is a Recommendation, not a final decision. The Commissioner of the Minnesota Department of Public Safety will make the final decision after reviewing the record and may adopt, reject, or modify the Findings of Fact, Conclusions, and Recommendations made herein. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least 10 days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. The parties should contact Charles Kenow, Administrator, Office of Pipeline Safety, 444 Cedar Street, Suite 147, St. Paul, MN 55101-5147, telephone (651) 296-9638 to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

STATEMENT OF ISSUES

Under Minn. Stat. § 216D.05 excavators must take precautions to avoid damage to underground facilities. While the Respondent was repairing a water main the splice in an underground electrical facility located nearby separated causing a power outage. Did the Respondent take proper precautions, such as shoring, to avoid damage to the electrical facilities near the construction area?

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mark S. Coffman is the owner and sole proprietor of M.S. Coffman Construction Co. He has been in the business of constructing and repairing water facilities (mains and related equipment) for approximately 30 years. On May 20, 1998, near the intersection of Nathan Lane and Shelard Parkway in Plymouth, Minnesota, Respondent was repairing a water main which had developed a leak caused by corrosion. The leak began the preceding February. Water supply in the main was turned off at that time. Nonetheless, the soil around the construction area was saturated; the water table in that area was only 3 feet deep.

2. The first step Respondent took on May 20 was to locate gas and electric facilities near the construction area. Respondent's three-man crew did that by hand. It took them about 2-1/2 hours. Once the gas and electric facilities were located, Respondent began excavating the water main. The sides of the excavation were sloped at a ratio of 1 to 1. A Minnegasco crew was present during excavation because of concerns about the location and safety of its gas facilities. Crew members did not suggest shoring to prevent a cave-in.

3. Respondent located and exposed the gas and electric facilities and marked their location. A five foot section of the electrical facilities was exposed in this process. The gas and electric facilities were situated approximately two feet apart and six feet deep. The gas facility was located off the street but close to the curb. The electrical facility was one or two feet farther from the curb. The gas and electric facilities were laid on a ledge of soil. The water main was deeper and even farther from the curb: 20 feet from the electrical facilities and two to four feet deeper.

Patrick T. Conlin is a locator. In May 1998 he was employed by a firm that located gas and electric facilities for Northern States Power (NSP) and Minnegasco. On May 19, 1998, Conlin went to Respondent's worksite at the Respondent's request to mark gas and electric lines in the construction area. The following day, Conlin was at the construction site when work began. At that time he believed that excavation was proceeding satisfactorily and he left to perform other duties.

Later in the morning, Conlin received notice from Respondent that an electrical splice at the site had separated causing an electrical outage in the area. The splice, which was unknown to Respondent or others, was located ten feet into the bank of the excavation. The splice separated when soil behind the exposed gas and electric lines moved down and under the ledge toward the water main excavation. Conlin discussed the outage with Respondent and later filed a field damage report (Exhibit 9) with his employer, Heath Consultants, Inc. Included with his report were pictures of the construction site which are not in evidence.

Pat J. Donovan is an inspector for OPS. On May 21, 1998 he received a complaint regarding the power outage at the Respondent's worksite and investigated the matter.

4. On May 29, 1998, OPS issued a Notice of Probable Violation charging that Respondent had failed to support NSP's primary electric cable in the construction area on May 20.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Public Safety have statutory authority to consider the charges against Respondent and the penalty, if any, he should pay under Minn. Stat. §§ 14.50 and 215D.08, subds. 1 and 2.
2. Under Minn. Stat. § 14.58 and Minn. R. 1400.5600, subp. 5, OPS's verbal motion to amend the charges against the Respondent was properly approved.
3. The Respondent received proper and timely notice of the hearing and of the charges against him and this matter is, therefore, properly before the Commissioner and the Administrative Law Judge.
4. OPS has complied with all relevant substantive and procedural legal requirements.
5. Under Minn. R. 1400.7300, subp. 5, OPS has the burden of proof to establish its charges against Respondent by a preponderance of the evidence.
6. For purposes of Minn. Stat. § 216D.01, subd. 6, Respondent is an excavator subject to the provisions of Chapter 216D.
7. OPS failed to establish that Respondent violated the provisions of Minn. Stat. § 216D.05 (1), (3), and (4).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner of Public Safety vacate the Notice of Probable Violation.

Dated this 12th day of May, 1999

JON L. LUNDE
Administrative Law Judge

Reported: Taped (2 tapes)

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Department is empowered to administer the Gopher State One Call excavation notice system.^[1] Among other things, the one-call system governs excavations of underground facilities such as gas, electric and water lines.^[2] In order to avoid damage to underground facilities, excavators must take the following precautions:

- (1) plan the excavation to avoid damage to and minimize interference with underground facilities in and near the construction area. . . .

* * *

- (3) provide support for underground facilities in and near the construction area. . . to protect the facilities; and
- (4) conduct the excavation in a careful and prudent manner.

Excavators who damage underground facilities must reimburse the facility operator for the cost of repairs.^[3] In a civil court action, damage caused by an excavator is *prima facie* evidence of negligence.^[4] An excavator who violates the statute relating to excavation precautions also is subject to a civil penalty.^[5] At the time of Respondent's alleged violation, the maximum allowable civil penalty was \$500 per violation per day.

OPS imposed a \$500 fine on Respondent on the grounds that he failed to take proper precautions to protect NSP's electric facilities when excavating a nearby sewer main. Three statutory violations are alleged. First, Respondent allegedly failed to "plan the excavation to avoid damage to" NSP's electrical facilities.^[6] OPS failed to establish this charge. Respondent provided proper notice of the proposed excavation, collected diagrams showing the location of utility facilities in the area, located gas and electric facilities by hand, talked to Minnegasco crew members and NSP's locator about the

excavation, marked the relevant boundaries of the electric and gas facilities, sloped the sides of the excavation and constructed a ledge on which the exposed gas and electric facilities rested. There is no persuasive evidence that he should have done more.

The second statutory precaution Respondent allegedly violated requires an excavator to “provide support for underground facilities in and near the construction area.”^[7] OPS argued that Respondent failed to shore the walls of the excavation or properly slope the sides. It failed to meet its burden on that charge. Two witnesses, Messrs. Conlin and Donovan, testified on behalf of OPS on this issue. They generally stated that the walls should have been shored or further sloped. However, neither of the two men have had any experience in actual excavation work and did not know what steps were common in the trade when excavating a water line under the conditions involved in this proceeding. Conlin could only state that he had seen shoring used and Donovan did not know what was required. Donovan did testify about OSHA standards but OPS stated that no fine was proposed due to the Respondent’s failure, if any, to follow OSHA regulations.

OPS reiterated several times that NSP’s facilities would not have separated if Respondent had not excavated in the area. That “but for” rationale is a rule of exclusion only. It does not, standing alone, establish negligence. There must be evidence that Respondent violated some standard of conduct. OPS failed to make that showing. Respondent was the only witness with any training, experience or expertise in excavation work. He denied any violation of accepted excavation practices and the record does not persuasively show that he should have done something more.

The record also fails to show that the electric facility separated because of inadequate sloping or shoring. Soil in the area of the splice was corrosive and the splice was corroded. OPS admitted that the cable was not as strong as a new one would have been and was weakened further by corrosion. The record does not show how far apart the spliced cables were separated or whether the splice could have parted during efforts to locate and expose the electric facilities. Respondent opined that soil under and behind the ledge may have moved, but nobody realized when the separation occurred or knows exactly what happened.

Among other things, the word “support” means “to hold in position so as to keep from falling, sinking or slipping.”^[8] It could be argued that Respondent didn’t provide support because the sides of the excavation he made were not shored. Although the statute states that an excavator must “provide support for underground facilities” it was clearly not intended to require shoring when shoring is unnecessary. Therefore, OPS must do more than establish that there was no shoring. It must also establish that shoring was needed and the failure to shore a reasonably foreseeable risk of a cave-in. Respondent testified that it would have been unnecessary and unreasonably expensive to shore the sides of the excavation and that the risk of cave-ins was satisfactorily addressed by the sloping Respondent did. Complainant presented no persuasive expert testimony showing that shoring was necessary or that further support was needed. It did not make that showing and the mere fact of the cave-in does not meet OPS’s burden.

Respondent testified that the water main was excavated at a 1:1 slope (i.e., one foot horizontal on each side for every vertical foot.) OSHA regulations generally require that excavations be sloped at an angle not steeper than one and one-half feet horizontal to every one foot vertical.^[9] Most loam (a Type B soil) may be sloped at a one to one ratio,^[10] but excavators must use a slope of one and one-half to one when soil is saturated as defined in OSHA regulations. No OSHA violation was asserted or established and the soil type is unknown.

Respondent is also charged with failing “to conduct the excavation in a careful and prudent manner.”^[11] There is no persuasive evidence that Respondent was negligent. Although Respondent may be liable to NSP for damages it sustained regardless of fault, a civil penalty can only be imposed under clause (4) if an excavator is negligent. The mere fact that damage occurred does not establish negligence and is not, by itself, sufficient to support a civil penalty.

J.L.L.

^[1] Minn. Stat. Ch. 216D.

^[2] Minn. Stat. § 216D.01, subd. 11.

^[3] Minn. Stat. § 216D.06, subd. 2

^[4] Minn. Stat. § 216D.06, subd. 3

^[5] Minn. Stat. § 216D.08

^[6] Minn. Stat. § 216D.05(1).

^[7] Minn. Stat. § 216D.05(3).

^[8] American Heritage College Dictionary 1364 (1993).

^[9] 29 C.F.R. 1926.652 (b) (1) (1998).

^[10] 29 C.F.R. 1926, subp. 9, appendices A and B

^[11] Minn. Stat. § 216D.05(4).